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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LORI AMTHOR FULKS

Appeal 2009-006292
Application 10/710,349
Technology Center 3600

Decided: February 23, 2010

Before WILLIAM F. PATE, III, MICHAEL W. O'NEILL, and
STEFAN STAICOVICI, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Lori Amthor Fulks (Appellant) appeals under 35 U.S.C. § 134 (2002) from the Examiner's decision rejecting claims 1-6, 8-10, and 14-18.¹ We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

THE INVENTION

Appellant's invention relates to a collapsible chair with back wheels that can be pulled by a handle in either a collapsed or an open position. Spec. 2, para. [0004] and fig. 1.

Claim 1 is representative of the claimed invention and reads as follows:

1. A collapsible chair having
 - (A) two front legs without wheels attached;
 - (B) two back legs;
 - (C) a flexible seat;
 - (D) a flexible back;
 - (E) an arm rest on each side of said seat;
 - (F) at least one wheel attached behind the bottom of each back leg so that said wheels do not bear the weight of said chair except when said chair is tipped;

¹ Claims 7 and 11-13 have been objected to by the Examiner as being dependent upon a rejected base claim and otherwise indicated as being allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claim. Claims 19 and 20 have been allowed by the Examiner.

- (H) flexible material between said seat and each arm rest and between said seat and said back, that prevents items placed on said seat from falling off said seat when said chair is tipped and pulled; and
- (G) a handle attached to the top of said chair, whereby said chair can be tipped and pulled by said handle with the weight of said chair borne by said wheels when said chair is in an open or collapsed position.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Logan	US 4,290,643	Sep. 22, 1981
Kilmer	US 6,312,048 B1	Nov. 6, 2001

The following rejections are before us for review:

The Examiner rejected claims 1-6, 9, 10, and 14-18 under 35 U.S.C. § 103(a) as unpatentable over Logan and Kilmer.

The Examiner rejected claim 8 under 35 U.S.C. § 103(a) as unpatentable over Logan, Kilmer, and Examiner's Official Notice.

THE ISSUES

1. Whether Logan discloses a folding chair including a seat, a back, arm rests, and a flexible material in between that prevents objects placed on the seat from falling off when the chair is pulled, as called for by claim 1.

2. Whether the combined teachings of Logan and Kilmer would have prompted a person of ordinary skill in the art to provide the wheels and handle of Kilmer's chair to the folding chair of Logan.
3. Whether the combined teachings of Logan and Kilmer render obvious a "lock for releasably holding said chair in a collapsed or open position," as required by claim 5.
4. Whether the combined teachings of Logan, Kilmer, and Examiner's Official Notice render obvious a handle that is "extendable towards and away from said seat," as required by claim 8.

SUMMARY OF DECISION

We AFFIRM-IN-PART.

OPINION

Appellant argues the rejection under 35 U.S.C. § 103(a) of claims 1-4, 6, 9, 10, and 14-18 together as a group. Br. 5. Therefore, in accordance with 37 C.F.R. § 41.37(c)(1)(vii)(2009), we have selected claim 1 as the representative claim to decide the appeal, with claims 2-4, 6, 9, 10, and 14-18 standing or falling with claim 1.

Issue (1)

Appellant argues that Logan does not disclose a seat, a back, and arm rests as *separate* elements in addition to a flexible material in between, as called for by in claim 1. Br. 6-7. Pointing to Figure 1 of Logan, the Examiner responds that Logan discloses a seat (element 1), a flexible back

(element 22), and an armrest on each side (element 23) that are separated by compression members. Ans. 6.

Although we agree with Appellant that Logan does not disclose a seat, a back, arm rests, and a flexible material in between as *separate* elements, we note that the scope of claim 1 is not so limiting. As stated by our reviewing court in *In re Hiniker Co.*, 150 F.3d 1362, 1369 (Fed. Cir. 1998), “the name of the game is the claim.” It is well established that limitations not appearing in the claims cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982). In this case, although claim 1 requires a flexible seat, a flexible back, an arm rest on each side of the seat, and a flexible material in between, claim 1 does not require that these elements be separate, as Appellant argues.

It is our finding that Logan discloses a folding (collapsible) chair including forward leg portions 24, rearward leg portions 25, arm rest portions 23, back portion 22, and a seat portion in between arm rest portions 23, all connected in between by a continuous seat material 1. *See Logan*, col. 2, ll. 8-25 and 35-38 and fig. 1. Moreover, we find that the forward leg portions 24 function as front legs, the rearward leg portions 25 function as back legs, the arm rest portions 23 function as arm rests, the back portion 22 functions as a back, and the seat portion (in between arm rest portions 23) functions as a seat for an occupant. As such, we conclude that Logan discloses a folding (collapsible) chair including a seat, a back, arm rests, and a flexible material in between, as called for by claim 1.

Appellant further argues that the purpose of Appellant’s claimed flexible material is “to prevent objects placed on the seat from falling off

when the chair is pulled.” Br. 5-6. Specifically, Appellant argues that because Logan’s chair includes gaps on each side of the chair,

. . . objects placed on the seat, such as sunglasses, cans, and toys, will simply roll or slide on the seat towards the gaps at the back of the seat and then fall off the seat.

Br. 6.

In a first instance, we note that claim 1 is not limited to “sunglasses, cans, and toys,” as Appellant argues, but rather to the much broader term, “items.” Appellant’s Specification does not expressly define the term or otherwise indicate that this term is used in a manner other than its ordinary and customary meaning. Accordingly, we construe this term in accordance with its ordinary and customary meaning. The term “item” refers to “each *thing* specified separately in a list.” MERRIAM WEBSTER’S COLLEGiate DICTIONARY (10th Ed. 1997). Emphasis added. Since the term “items” is not limiting with respect to a specific object, we agree with the Examiner’s position that the chair of Logan is capable of preventing items placed on the seat, such as a sweater, from falling off the seat when the chair is collapsed. *See Ans. 6.* Accordingly, we find that the folding chair of Logan is capable of preventing items (objects, things) placed on the seat from falling off when the chair is pulled, as called for by claim 1.

Issue (2)

Appellant argues that because “[t]he rear ‘legs’ of Logan are ‘flexible tension members’ 11 and 12, which are just cords. . . it would be impossible to attach wheels.” Br. 7. Appellant further argues that “[c]ompression members 8 and 9 are rigid, but at such odd angles that it would not be easy

to attach Kilmer's wheels to them at the appropriate position and orientation." *Id.* Appellant concludes that, "it would not be obvious to add Kilmer's wheels to Logan's chair." *Id.*

Although we agree with Appellant that the flexible tension members 11 and 12 are cords and the compression members 8 and 9 are rigid, nonetheless, "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton." *KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). Appellant has not provided any evidence to show that it would be *impossible* to attach the wheels of Kilmer to the collapsible chair of Logan. An attorney's arguments in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Although flexible tension members 11-16 are cable wire, Logan specifically discloses that each flexible tension member passes through a suitable fixing in the ends of compression members 2, 3, and 6-9. Logan, col. 2, ll. 38-47. A person of ordinary skill and creativity in the art of collapsible chairs would have known how to attach Kilmer's wheels to the fixings of Logan's chair using known attachments such as brackets and screws.

Appellant further argues that because "Logan's chair is light-weight there is no need to add wheels to it as it can be easily carried." Br. 7. Similarly, Appellant argues that adding a handle to Logan's chair would conflict with Logan's purpose, namely, "to provide a light-weight chair that can be easily carried." *Id.* Although we agree with Appellant that adding the wheels and handle of Kilmer to the chair of Logan would somewhat increase the weight of Logan's chair, we find that the chair will nonetheless function as required, that is, it will be easy to carry or transport between locations. "The fact that the motivating benefit comes at the expense of

another benefit, ... should not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another.” *Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n.8 (Fed. Cir. 2000). In this case, we agree with the Examiner that Logan discloses all the features of claim 1 with the exception of a handle and at least one wheel attached behind the bottom of each back leg. *See Ans. 3.*

We further agree with the Examiner that Kilmer discloses a handle attached at the top of a folding chair and at least one wheel attached behind the bottom of each back leg. *See Ans. 3-4. See also*, Kilmer, fig. 1a. As such, Appellant’s claimed collapsible chair is nothing more than Logan’s folding chair to which the wheels and the handle of Kilmer’s folding chair have been added. Moreover, the Examiner has articulated a reasoning with rational underpinning to modify Logan’s chair with the handle and wheels of Kilmer’s chair, namely, “to make it easier to the user when transporting the chair from one location to the other.” Ans. 4. As such, modifying the folding chair of Logan to include the wheels and handle of Kilmer’s chair would not have been uniquely challenging to a person of ordinary skill in the art, because it is “the mere application of a known technique to a piece of prior art ready for the improvement.” *KSR*, 550 U.S. at 417. The modification appears to be the product not of innovation but of ordinary skill and common sense.

Moreover, Appellant has not alleged, much less shown, that the modification of Logan to provide the handle and wheels of Kilmer’s chair would have been beyond the skill of a person of ordinary skill in the art. Hence, we agree with the Examiner that it would have been obvious for a

person of ordinary skill in the art to provide the wheels and handle of Kilmer to the folding chair of Logan in order “to make it easier to the user when transporting the chair from one location to the other.” Ans. 4.

In conclusion, for the foregoing reasons, the rejection of claim 1, and claims 2-4, 6, 9, 10, and 14-18, standing or falling with claim 1, is sustained.

Issue (3)

Appellant argues that neither Logan nor Kilmer discloses a lock for releasably holding the chair in a collapsed or open position. Br. 8. In response, the Examiner takes the position that element 13 of Logan and the bungee cords 40, 41 of Kilmer constitute locking devices. Ans. 4 and 9. In turn, Appellant argues that element 13 of Logan is merely a cord that will not prevent the chair from collapsing and that the purpose of bungee cords 40, 41 of Kilmer is not to hold the chair in a collapsed or open position, but rather “after the chair is collapsed, ‘to hold down items such as a cooler, picnic basket, beach balls, sand pails, and another, preferably smaller beach chair, and so forth.’” Br. 8.

We disagree with Appellant’s position for the following reasons. First, although the bungee cords 40, 41 of Kilmer are used to hold down items, nonetheless, the chair is held in a collapsed state. A person of ordinary skill in the art would have readily recognized that if the bungee cords 40, 41 of Kilmer were to be removed, the items held by the chair would force the chair open. As such, the bungee cords 40, 41 of Kilmer hold the chair in a collapsed state, as required by claim 5, while providing the additional benefit of holding items for easy transportation.

Second, although flexible tension member 13 of Logan is a cord, nonetheless, when the flexible tension members are placed in tension, Logan's chair is maintained in an open position and when tension is released the chair collapses. Specifically, we find that by means of detachable device 17 tension is applied to the elements forming Logan's chair and also tension is released so as to fold the chair. Logan, col. 2, ll. 54-60 and fig. 2. As such, because the detachable device 17 places the flexible tension members 11-16 in tension so as to maintain the chair in an open position, we find that the detachable device 17 and the flexible tension members 11-16 constitute a lock that holds the chair in an open or a collapsed position.

In conclusion, for the foregoing reasons, the rejection of claim 5 is likewise sustained.

Claim 8

With respect to the rejection of claim 8 under 35 U.S.C. § 103(a) as unpatentable over Logan, Kilmer, and Examiner's Official Notice, the Examiner's position is that:

Logan and Kilmer lack the teaching of item on the seat of a collapsible chair and pulling the chair by the handle, Examiner is taking official notice that it is common knowledge to one of ordinary skill in the art to include an item on the seat of a collapsible chair and pulling the chair by the handle making it easier on the elderly to haul.

Ans. 5-6.

However, claim 8 requires a "handle [that] is extendable towards and away from said seat."

In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); see also *In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). In this case, we find that the Examiner has not made any factual finding as to the handle called for in claim 8. We agree with Appellant that although the heading of the rejection relates to claim 8, the body of the rejection appears to be related to the subject matter of claim 18. Br. 4.² Accordingly, we find the Examiner's legal conclusion of obviousness is not supported by facts, and thus, cannot stand. See *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967) (holding that “[t]he legal conclusion of obviousness must be supported by facts. Where the legal conclusion is not supported by facts it cannot stand.”).

Therefore, we are constrained to reverse the rejection of claim 8 over the combined teachings of Logan, Kilmer, and Examiner's Official Notice.

CONCLUSIONS

1. Logan discloses a folding chair including a seat, a back, arm rests, and a flexible material in between that prevents items placed on the seat from falling off when the chair is pulled, as called for by claim 1.
2. The combined teachings of Logan and Kilmer would have prompted a person of ordinary skill in the art to provide the wheels and handle of Kilmer's chair to the folding chair of Logan.

² Like in the Examiner's Answer, in the Final Rejection mailed May 3, 2006, the Examiner refers to claim 8 in the heading, but then discusses the subject matter of claim 18 in the body of the rejection. Ans. 5-6 and Final Rejection 5.

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3. The combined teachings of Logan and Kilmer render obvious a “lock for releasably holding said chair in a collapsed or open position,” as required by claim 5.
4. The combined teachings of Logan, Kilmer, and Examiner’s Official Notice do not render obvious a handle that is “extendable towards and away from said seat,” as required by claim 8.

DECISION

The Examiner’s decision to reject claims 1-6, 9, 10, and 14-18 under 35 U.S.C. § 103(a) as unpatentable over Logan and Kilmer is affirmed.

The Examiner’s decision to reject claim 8 under 35 U.S.C. § 103(a) as unpatentable over Logan, Kilmer, and Examiner’s Official Notice is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

mls

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